



# REPORT ON THE LAW ENFORCEMENT LINEUP POLICY SURVEY AND REVIEW



**Spring 2012**  
[www.dcjs.virginia.gov](http://www.dcjs.virginia.gov)

At the December 10, 2010 Virginia Crime Commission meeting the following recommendations were voted on and approved:

- Require the Department of Criminal Justice Services (DCJS) to develop training for law enforcement officers routinely involved in conducting lineups;
- Request that DCJS conduct an audit and report findings to the Crime Commission by the fall of 2011 on the status of law enforcement agencies' adoption of lineup policies; and,
- Request the Virginia Law Enforcement Professional Standards Commission (VLEPSC) to consider revising the accreditation standard for lineups.

This paper reports on the effort made to fulfill the second recommendation above: a survey of Virginia law enforcement agencies about their lineup policy and a policy analysis of those policies.

## BACKGROUND:

In 2010, the Virginia State Crime Commission examined police lineup policies. As part of their effort, the Commission surveyed 134 law enforcement agencies to determine: the number of Virginia law enforcement agencies that had a written lineup policy, if the sequential method or blind administration method were being used in conducting lineups, and the extent and availability of training which focused on conducting lineups. For agencies with a written lineup policy, a copy of the policy was requested to be included in the Commission's lineup policy analysis.

Based on the study's findings, the Crime Commission made three recommendations:

1. Require DCJS to develop training for law enforcement routinely involved in conducting lineups<sup>1</sup>,
2. Request that DCJS conduct an audit and report findings to the Crime Commission by the fall of 2011 on the status of law enforcement agencies' adoption of lineup policies, and
3. Request that the Virginia Law Enforcement Professional Standards Commission (VLEPSC) consider revising the accreditation standard for lineups<sup>2</sup>.

In spring 2011, the Crime Commission staff made presentations to the Virginia Sheriff's Association (VSA) and the Virginia Association of Chiefs of Police (VACP) on the study's results and on best practices for lineup procedures.

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<sup>1</sup> The agency is currently developing a curriculum for law enforcement lineup training. This training is being developed for both classroom and on-line (distance) training and will be available for both the minimum compulsory (basic) training for law enforcement as well as in-service training for current law enforcement officers.

<sup>2</sup> DCJS sent a copy of the current standard to the Virginia Crime Commission's senior staff attorney on January 19, 2012 and asked for suggestions for modification. As of the writing of this report, we have not received a response.

## METHODOLOGY:

In response to the Crime Commission's request that DCJS conduct an audit and report its findings on the status of lineup policies, DCJS contacted 267 Virginia law enforcement agencies statewide and requested their participation in a survey and policy review in September 2011. These agencies included city/county police departments, sheriff's offices with primary law enforcement duties, town police departments and the Virginia State Police. The agencies were asked to respond to an online survey about the agency's lineup policy, and were asked to provide a copy of their written policy. By November, responses to the survey and/or policy request were received from a total of 135 law enforcement agencies.

### SURVEY

A total of 123 survey responses were received. Of these, 100 sent a copy of their current lineup policy, 9 do not have a current policy so they did not send one, and 14 indicated in the survey that they do have a policy, but they did not send it in.

### POLICY

A total of 115 policies were received. Of these, 15 agencies sent in a copy of their current lineup policy but did not complete the survey.

Of the 135 responses received, 96 were from city/county police departments or sheriff's offices with primary law enforcement duties, 38 were from town police departments and 1 was from the Virginia State Police. In comparison, in the Crime Commission's 2010 study, 97 survey and/or policy responses were received from city/county police departments, sheriff's offices with primary law enforcement duties and the Virginia State Police. The Crime Commission did not include town police departments in its 2010 study.

## SURVEY

The survey was conducted online. Potential respondents were given a password to gain access to the survey from the DCJS website. Depending on how the person taking the survey responded to certain questions, the survey consisted of between 5–10 questions (not including a few identification questions at the start of the survey).

*A copy of the survey's questions can be found in the appendix to this report.*

## POLICY REVIEW

In the request to law enforcement agencies, in addition to being asked to participate in the online survey, they were also asked to send in a copy of their written policy on conducting physical and/or photographic lineups. The request was again repeated at the end of the online survey. All of the policy reviews were performed by one researcher so that the assessments were uniform. Each policy was reviewed for the existence of 11 items often found or recommended to be included in law enforcement lineup policies.

These policy items were:

- Require that "fillers" similar to the suspect be used
- Use of the sequential method (*A sequential lineup requires witnesses to view one lineup member at a time [in person or photograph] and decide whether or not that person is the perpetrator prior to viewing the next lineup member.*)
- Require the use of a current picture of the suspect
- Require administrators to refrain from influencing the witness
- Provide formal instructions for witnesses
- Mandate only one suspect per lineup
- Require documented results of the lineup
- Separate the witnesses if there are more than one
- State preference for a video or audio recording of the lineup
- Have policies that are substantially similar to DCJS General Order 2-39 (*see appendix for the full text of GO 2-39*)
- Require the use of independent administrators (similar to double-blind lineup method) (*Double-blind method means that neither the witness nor the officer conducting the lineup knows which lineup participants are suspects. Independent administrator is a lineup administrator who is not participating in the investigation of a criminal offense and who is unaware of which person in the lineup is the suspect.*)



## RESPONSE RATES:

A total of 263 law enforcement agencies were contacted and asked to participate in the survey and send in a copy of their current lineup policy. Of these, 135 responded by either completing a survey, sending in a copy of their policy, or both. This resulted in an overall response rate of 51%.

### SURVEY RESPONSE

A completed survey was received from 123 agencies resulting in a 47% response rate for the survey.

### POLICY RESPONSE

A copy of current lineup policy was received from 115 agencies resulting in a 44% response rate for the policy request.

## ISSUES OF PRIMARY INTEREST:

The following describes the findings from both the survey and policy review focusing on items of particular interest and on changes found among Virginia law enforcement lineup policy over the past year.

### A. PERCENT OF VIRGINIA LAW ENFORCEMENT AGENCIES (LEAS) THAT HAVE A WRITTEN LINEUP POLICY AS REQUIRED BY **VIRGINIA CODE §19.2-390.02**

**Virginia Code §19.2-390.02** states: “Policies and procedures for law enforcement to conduct in-person and photo lineups—The Department of State Police and each local police department and sheriff’s office shall establish a written policy and procedure for conducting in-person and photographic lineups. (2005, cc. 187, 229.)”

Of the 123 agencies that completed the survey, 93% (114) said they have a written lineup policy.

| Percent of VA LEAs That Have Lineup Policy Per VA CODE §19.2-390.02 |           |         |            |
|---|-----------|---------|------------|
| AGENCY TYPE   | YES       | NO      | TOTAL      |
| City/Co Police Dept (PD)  | 100% (38) | 0% (0)  | 100% (38)  |
| Sheriff’s Offices (SO)  | 92% (48)  | 8% (4)  | 100% (52)  |
| Town Police Dept (PD)   | 84% (27)  | 16% (5) | 100% (32)  |
| VA State Police (VSP)   | 100% (1)  | 0% (0)  | 100% (1)   |
| Total   | 93% (114) | 7% (9)  | 100% (123) |

### B. USE OF THE SEQUENTIAL LINEUP METHOD IN PHOTOGRAPHIC AND/OR PHYSICAL (IN-PERSON) LINEUPS

*A sequential lineup requires witnesses to view one lineup member at a time (whether it’s a photographic or physical/in-person lineup) and decide whether or not that person is the perpetrator prior to viewing the next lineup member. This is different from a simultaneous lineup—the more traditional method of lineups where the witness is shown multiple persons or photos at the same time.*

Of the 123 law enforcement agencies that responded to the survey, nearly half (46%) reported that they use the sequential lineup method and one-quarter (24%) said that they use the sequential method when possible.

| Percent of VA LEAs That Use Sequential Lineup Method—Survey |      |     |               |            |
|---|------|-----|---------------|------------|
| AGENCY TYPE   | YES  | NO  | WHEN POSSIBLE | TOTAL      |
| City/Co PD  | 58%  | 24% | 18%           | 100% (38)  |
| SO  | 42%  | 29% | 29%           | 100% (52)  |
| Town PD   | 38%  | 38% | 25%           | 100% (32)  |
| VSP   | 100% | 0%  | 0%            | 100% (1)   |
| Total   | 46%  | 29% | 24%           | 100% (123) |

Of the 115 policies that were sent in for review by law enforcement agencies, two-thirds state that the sequential lineup method should be used.

| Percent of VA LEAs Whose Policy States Use of Sequential Lineup Method—Policy Review |      |     |               |            |
|--|------|-----|---------------|------------|
| AGENCY TYPE  | YES  | NO  | WHEN POSSIBLE | TOTAL      |
| City/Co PD   | 73%  | 27% | 0%            | 100% (37)  |
| SO   | 65%  | 30% | 4%            | 100% (46)  |
| Town PD  | 61%  | 39% | 0%            | 100% (31)  |
| VSP  | 100% | 0%  | 0%            | 100% (1)   |
| Total  | 67%  | 31% | 2%            | 100% (115) |

There were thirteen agencies whose response to the survey did not reflect the same information about their use of the sequential method as was found in their lineup policy. This may reflect an error in their survey response or a lack of familiarity with their current policy.

#### C. USE OF AN INDEPENDENT ADMINISTRATOR IN PHOTOGRAPHIC AND/OR PHYSICAL (IN-PERSON) LINEUPS (RESULTING IN A DOUBLE-BLIND LINEUP PROCEDURE)

*An independent administrator is a lineup administrator who is not participating in the investigation of the criminal offense and who is unaware of which person in a given lineup is the suspect. A double-blind lineup procedure means that neither the witness nor the officer conducting the lineup knows which lineup participants are suspects.*

Of the 123 law enforcement agencies that responded to the survey, 13% reported that they use independent administrators to conduct lineups while over half (59%) said that they do not use independent administrators.

| Percent of VA LEAs That Use Independent Administrators in Lineups—Survey |      |     |               |            |
|--|------|-----|---------------|------------|
| AGENCY TYPE  | YES  | NO  | WHEN POSSIBLE | TOTAL      |
| City/Co PD   | 13%  | 58% | 29%           | 100% (38)  |
| SO   | 10%  | 63% | 27%           | 100% (52)  |
| Town PD  | 16%  | 56% | 28%           | 100% (32)  |
| VSP  | 100% | 0%  | 0%            | 100% (1)   |
| Total  | 13%  | 59% | 28%           | 100% (123) |

Of the 115 policies that were sent in for review by law enforcement agencies, over one-third state that independent administrators are used to conduct lineups.

| Percent of VA LEAs Whose Policy States Use of Independent Administrators in Lineups—Policy Review |      |     |               |            |
|---|------|-----|---------------|------------|
| AGENCY TYPE   | YES  | NO  | WHEN POSSIBLE | TOTAL      |
| City/Co PD  | 30%  | 49% | 22%           | 100% (37)  |
| SO  | 39%  | 59% | 2%            | 100% (46)  |
| Town PD   | 48%  | 52% | 0%            | 100% (31)  |
| VSP   | 100% | 0%  | 0%            | 100% (1)   |
| Total   | 39%  | 53% | 8%            | 100% (115) |

There were 24 agencies whose response to the survey did not reflect the same information about their use of independent administrators as was found in their lineup policy. This may reflect an error in their survey response or a lack of familiarity with their current policy.

#### **D. PROBLEMS OR ISSUES IDENTIFIED BY AGENCIES**

The survey also provided an opportunity for respondents describe any difficulties their department has faced regarding photographic and in-person lineups. The most frequently described issues are listed below.

##### **Photographic lineups**

- The most often identified problem with photo lineups is obtaining photographs similar enough in scale or background or similar enough to a given suspect so that they can be used as fillers in a photo lineup. Some agencies said they found solutions to this problem (1) through the use of DMV photos, (2) by obtaining more sophisticated scanner/printers so that original photos can be altered in scale, (3) by networking with neighboring agencies, and (4) with updates in Records Management Systems (RMS) systems.
- Obtaining juvenile photographs for photo lineups was also mentioned as difficult because of some agency's retention policies for juvenile photos.

##### **Physical lineups**

- Physical lineups are not as common as photographic lineups and are not practiced by some agencies due to their small department size or lack of facilities. Some agencies include in their policy that they do not perform physical lineups.

##### **Independent administrator/double blind method**

- Another challenge mentioned by smaller agencies is the difficulty in practicing the double blind method or using an independent administrator for lineups.

##### **Training**

Training was also noted as a challenge in regard to lineup policy, whether it is training all newly assigned investigators or the time-consuming nature of training the whole department.

## E. POLICY REVIEW—POLICY ELEMENTS

All agencies that were contacted to participate in the survey were asked to forward a copy of their written lineup policy, if they have one, so that it could be included in the review and policy analysis. A total of 115 agencies sent in a copy of their policy. Each policy was reviewed for the inclusion of specific policy elements. The percentage of policies that contained each element are displayed in the table below and are compared to the percentage found in the Crime Commission's (CC) 2010 policy analysis.

| Lineup Policy Analysis Findings         |           |          |   |
|---|-----------|----------|---|
|   | DCJS 2011 | CC 2010  | NOTES   |
| Number of Policies Received             | 115       | 82       |   |
| <b>Policy Elements</b>                  |           |          |   |
| Require similar fillers                 | 98% (113) | 94% (77) | DCJS's total includes "sequential use is required, used when possible, or is an option"                               |
| Use sequential method                   | 72% (83)  | 66% (54) |   |
| Require documented lineup results       | 69% (80)  | 55% (45) |   |
| Formal witness instruction              | 66% (76)  | 57% (47) |   |
| Only one suspect per lineup             | 66% (76)  | 55% (45) |   |
| Admin must not influence witness        | 65% (75)  | 59% (48) | DCJS—did not assess as "substantially similar" those policies that excluded requirement for independent administrator |
| Require current suspect picture         | 63% (73)  | 62% (51) |   |
| Separate witnesses                      | 54% (62)  | 46% (38) |   |
| Policy substantially similar to GO 2-39 | 46% (53)  | 21% (17) |   |
| Require independent administrator       | 38% (44)  | 6% (5)   |   |
| Preference for video/audio              | 10% (12)  | 10% (12) | DCJS—includes only those that required; did not include those that said, "whenever possible"                          |

In comparing the policy analysis findings from 2011 and 2010, the most noticeable change is in the percentage of agencies whose policy now requires that an independent administrator conduct lineups at their agency.

## F. POLICY REVIEW – GENERAL ORDER 2-39 AND GENERAL ORDER 2-1

In the review and analysis of the lineup policies sent in by law enforcement agencies throughout Virginia, it was found that many agencies either replicated or modeled their policy after either General Order 2-39 (GO 2-39) or General Order 2-1 (GO 2-1).

GO 2-39 is a model policy developed by DCJS and is included in its Model Policies Manual for Virginia Law Enforcement Agencies. This manual is a collection of important administrative and operational policies required by the Code of Virginia or adopted by DCJS to address new, changing, or emerging areas of criminal justice. The version of GO 2-39 used for this policy analysis was adopted in July 2005 and was in place until November 16, 2011 when it was updated by a DCJS model policy workgroup. GO 2-39 (2005) was used for this policy analysis and is very similar to HB207 (2010) except that HB207 requires the use of an independent administrator, while GO 2-39 only suggests the use.

The recent updates to GO 2-39 (2011) were made to create policy that reduces the likelihood of misidentification in lineups through the use of updated methods. Generally, the updates made to the model policy included adding definitions for various terms used in the policy, including blind administration, confidence statements, fillers, folder shuffle method and show-up identifications; and adding to the procedural sections information about show-up identification, confidence statements, witness instructions, and encouraging video recordings be made of identification procedures.

GO 2-1 (1993) is an older DCJS model policy that was adopted in 1993. It addresses various constitution safeguards including: Probable Cause and Reasonable Suspicion, Procedures, Interviews and Interrogations, Search and Seizure, Eyewitnesses, Vehicles, Limitations on Authority, and Constitutional Requirements. Under the Eyewitnesses section, it very briefly describes the forms that eyewitness identifications may take, these being: on-scene identification, lineups and photo lineups.

*(All of the above referenced DCJS model policies can be found in the Appendix section of this report.)*

The table below shows the percentage of agencies that substantially modeled their lineup policy on GO 2-39 (2005), GO 2-1 (1993), or developed their own original policy specific to their department's needs. Overall, slightly over one-half of the agencies modeled their line-up policies on GO 2-39.

| Percentage of VA Law Enforcement Agencies by Policy Type |                           |                          |                               |            |
|--|---------------------------|--------------------------|-------------------------------|------------|
| AGENCY TYPE  | Modeled on GO 2-39 (2005) | Modeled on GO 2-1 (1993) | Developed Own Original Policy | TOTAL      |
| City/Co PD   | 58%                       | 8%                       | 34%                           | 100% (38)  |
| SO   | 50%                       | 25%                      | 25%                           | 100% (44)  |
| Town PD  | 47%                       | 41%                      | 13%                           | 100% (32)  |
| VSP  | 100%                      | 0%                       | 0%                            | 100% (1)   |
| Total  | 52%                       | 23%                      | 24%                           | 100% (115) |

## CURRENT STATUS:

As mentioned previously, the DCJS model policy concerning lineups was very recently updated to reflect changes in lineup methods that help to reduce the instance of mistaken identifications. These updates were developed and put forward by a workgroup convened specifically to address best practices in law enforcement lineups.

Additionally, the agency is currently developing a curriculum for law enforcement lineup training. This training is being developed for both classroom and online (distance) training and will be part of both the minimum compulsory (basic) training for law enforcement as well as in-service training for current law enforcement officers.



# APPENDICES

## Appendix I: Copy of Survey Instrument

### LAW ENFORCEMENT LINEUP SURVEY

*In their 2010 Annual Report the Virginia Crime Commission requested that DCJS audit local law enforcement agency compliance with Virginia Code §19.2-390.02 as well as identify issues with developing and implementing a written policy governing the conduct of lineups. Your cooperation in the timely completion and submission of this brief survey is greatly appreciated. The results of this audit will be presented to the Crime Commission on November 16, 2011.*

#### Agency contact information

1. Name of agency
2. Name of agency contact
3. Phone number of agency contact (use xxx-xxx-xxxx format)
4. Email address of agency contact
5. Current number of sworn law enforcement officers in your agency

#### Law Enforcement Lineups

Please answer the following questions regarding your agency's protocol for in-person and photographic lineups.

6. Does your department currently have a written policy for conducting in-person and photographic lineups as outlined in Virginia Code §19.2-390.02?

☐ Yes      ☐ No

If 6 = yes,

6a. In what year was your agency's current lineup policy implemented? (use XXXX format)

6b. Has your agency's lineup policy been modified in the past 2 years?

☐ Yes      ☐ No

Other (please describe)

If 6b = yes

6b-1. Please describe how your agency's policy was modified.

If 6 = no,

6c. What is/are the reason(s) that your agency does not currently have a written policy for conducting in-person and photographic lineups?

6d. What would help your agency to develop and implement a written policy for conducting in-person and photographic lineups as outlined in Virginia Code §19.2-390.02?

#### Method of Lineup

7. Does your agency currently use the sequential method for lineups?

[A sequential lineup requires witnesses to view one lineup member at a time (in person or photograph) and decide whether or not that person is the perpetrator prior to viewing the next lineup member.]

☐ Yes, in all lineups      ☐ Yes, whenever possible      ☐ No

Other (please describe)

8. Does your agency use the double-blind method or an independent administrator for lineups?

(Double-blind method means that neither the witness nor the officer conducting the lineup knows which lineup participants are suspects.

Independent administrator means a lineup administrator who is not participating in the investigation of a criminal offense and who is unaware of which person in the lineup is the suspect.)

☐ Yes, in all lineups      ☐ Yes, whenever possible      ☐ No

#### Total Number of Lineups Conducted

9. How many lineups did your agency conduct in calendar year (CY) 2010?

(Please provide the number of lineups conducted and indicate whether it is an actual number or an estimated number. If you do not know and are unwilling to estimate, reply "don't know.")

#### Comments

10. Please use the space below to describe any difficulties your department has faced regarding in-person and photographic lineups, and, if applicable, how your agency resolved or attempted to resolve such issues:

If 6 = yes (if your department currently has a written policy for conducting in-person and photographic lineups),

Please email or fax a copy of your department's lineup policy by Friday, October 7, 2011 to:

Teresa Gooch, DCJS Law Enforcement Division Director

(email) [teresa.gooch@dcjs.virginia.gov](mailto:teresa.gooch@dcjs.virginia.gov) (fax) 804.786.0410

#### Survey Complete!

Thank you for taking the time in completing this survey. If you have any questions, please contact:

Teresa Gooch, DCJS Law Enforcement Division Director

(email) [teresa.gooch@dcjs.virginia.gov](mailto:teresa.gooch@dcjs.virginia.gov) (phone) 804.786.8730

## Appendix 2: DCJS Model Policy 1993–present

### **GENERAL ORDER 2-39 (ADOPTED 2011)**

#### **Model policy on Lineups/Eyewitness Identifications**

A law enforcement agency should attach the highest priority to the protection of the citizens that they serve. Recognizing that innocent persons may occasionally be wrongfully implicated in criminal matters, we attach equal importance to clearing innocent persons as that attached to arresting the guilty. Ten of thirteen DNA exonerations in Virginia involved eyewitness misidentifications. Few cases in Virginia have been suitable for DNA testing, since the policy until the last decade was that crime scene evidence would be destroyed post-conviction. Those Virginia eyewitness identifications involved suggestive and unreliable eyewitness identification procedures.<sup>3</sup>

According to a 1999 National Institute of Justice report, over 75,000 people a year become criminal defendants based on eyewitness identification.<sup>4</sup> Research of cases in which DNA evidence has been used to exonerate individuals previously convicted of crimes, leads many experts to conclude that improved, more reliable methods of handling eyewitness identifications may promote higher standards of justice.

Misidentification, for instance, has plagued 74% of the nation's first 273 DNA exonerations. There was at least one misidentification in 203 of the nation's 273 wrongful convictions proven by DNA testing. DNA-proven exonerations, however, only begin to describe the scope of the misidentification problem. Criminalists estimate that biological evidence that has the power to establish guilt or innocence is available in approximately 10% of criminal cases and the total number of DNA exonerations only represent those cases of innocence that have come to light thus far. Nearly  $\frac{3}{4}$  of the nation's wrongful convictions proven through DNA testing involved a misidentification.

Misidentification not only results in harm caused to the wrongfully convicted and their loved ones; it also harms all members of the criminal justice system and greater society. Misidentifications can hinder investigations when the wrong person is focused upon, harming police work. When a witness misidentifies someone, even when the investigation is re-focused, the competency of that witness might be brought into question, thereby harming prosecutions. Crime victims are also traumatized in the face of a misidentification, experiencing guilt not only for a wrongful conviction, but also feelings of culpability for all of the crimes committed by the real perpetrator that could have been prevented if the right person was identified in the first place. It also adversely affects the credibility of the police in the community and erodes the trust between the public and the community, which is fundamental to effective policing and a safe community.

Of the nation's 273 DNA exonerations, the process of settling the claim of innocence led to the identification of the real perpetrators in 123 cases. A total of 107 real perpetrators have been identified<sup>5</sup> and these individuals—while the innocent were wrongfully behind bars—went on to be convicted of more than 60 rapes, 24 murders and several other violent crimes.

Therefore, there are many reasons to re-visit the traditional methods of identifying perpetrators of crime. Outdated methods—and not the members of law enforcement using those methods—are the cause of many of these misidentifications. Fortunately, more than 30 years of peer-reviewed research can inform how we can set about improving these outmoded methods so that the system can achieve both reliable and accurate identification evidence.

The Department of Criminal Justice Services would like to thank the following individuals for their professional contributions to this policy:

<sup>3</sup> "Convicting the Innocent" Professor Brandon L. Garrett, University of Virginia School of Law

<sup>4</sup> "Mistaken Eyewitness Identification: The Problem." Available at <http://www.innocenceproject.org/causes/mistakenid.php>.

<sup>5</sup> This number is lower because some perpetrators were connected with multiple crimes.

Ms. Rebecca Brown, The Innocence Project  
 Professor Brandon Garrett, University of Virginia School of Law  
 Sheriff Steve Dempsey, King George County Sheriff's Office  
 Chief William Hodges, Town of West Point Police Department  
 Acting Assistant Chief Charles Mason, Roanoke County Police Department  
 Captain William Dean, City of Virginia Beach Police Department  
 Captain Ken Caldwell, City of Fairfax Police Department  
 Captain Anthony Meredith, Town of Pulaski Police Department  
 Lieutenant David Ashby, Grayson County Sheriff's Office  
 Lieutenant David Pughes, Dallas, Texas Police Department  
 Sergeant Frank Myrtle, City of Winchester Police Department

| POLICE/SHERIFF'S OFFICE                           | GENERAL ORDERS                                    |
|---|---|
| <b>SUBJECT:</b> Lineups/Eyewitness Identification | <b>NUMBER:</b> 2-39                               |
| <b>EFFECTIVE DATE:</b> 11/16/11                   | <b>REVIEW DATE:</b> (annually)                    |
| <b>AMENDS/SUPERSEDES:</b> 2-39-7/1/05             | <b>APPROVED:</b> _____<br>Chief of Police/Sheriff |
| <b>VLEPSC STANDARDS:</b> OPR.02.03                |   |

**NOTE:** This order is for internal use only and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third-party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a non-judicial setting.

## Index Words

*Eyewitness Evidence: A Guide for Law Enforcement*

eyewitness identification

fillers (non suspects)

lineup

lineup Identification Form

lineup identification number

live lineup

mugshots

photo Lineup

right to counsel

sequential Lineup

show-up

## **I. Policy**

Given that the traditional system for conducting eyewitness identification procedures is not infallible and that the procedures did not incorporate the growing body of psychological study of eyewitness memory and behavior, the National Institute of Justice (Department of Justice), the International Association of Chiefs of Police, the Commission on Accreditation of Law Enforcement Agencies, the Police Executive Research Forum, the American Bar Association and others have issued reports and/or directives responding to a need for change in this area of police practice. These reports and recommendations attempt to take the basic elements of police investigations and suggest workable changes in order to achieve more consistent eyewitness results.

The following procedures for use in Virginia incorporate many of the recommendations issued by the United States Department of Justice in its Eyewitness Evidence: A Guide for Law Enforcement and also include those practices that have gained the support of social scientists and law enforcement practitioners since its publication. An identification obtained through a lineup composed in this manner should minimize the risk of misidentification and have stronger evidentiary value than one obtained without these procedures. Specifically, use of these procedures should maximize the reliability of identifications, minimize unjust accusations of innocent persons and establish evidence that is reliable and conforms to established legal procedure.

## **II. Purpose**

To establish a policy for the preparation and presentation of photographic and in-person lineups.

## **III. Definitions**

### **A. Lineup**

A lineup is any procedure in which a victim or witness to a crime or other incident is asked to identify a suspect from among a group of persons in order to determine or confirm the identity of the suspect. Such procedures involve either actually viewing of persons (in live line-ups or show-ups) or viewing of photographs (in a photo lineup).

### **B. Photo Lineup**

An identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.

### **C. Sequential Lineup**

A method of administration where photographs are shown to the victim/witness one at a time, with an independent decision on each, before the next photo is shown.

### **D. Blind Administrator**

The person administering the line-up has no knowledge of which person in the photo/live line-up is the suspect.

### **E. Blinded Administration**

This is a lineup procedure in which the administrator may know the identity of the suspect, but by virtue of the use of procedures and/or technology to accomplish this purpose, does not know which lineup member is being viewed by the eyewitness.

### **F. Confidence Statements**

A statement in the victim/witness' own words, articulating their level of confidence in the identification taken at the time the identification is made.

### **G. Fillers**

Non-suspect photographs or line-up members.

### **H. Folder Shuffle Method (An Acceptable Alternative to the Use of a Blind Administrator)**



The “Folder System” was devised to address concerns surrounding limited personnel resources while allowing for blind administration. Should the investigating officer of a particular case be the only law enforcement personnel available to conduct a photo lineup, the following instructions are recommended:

1. Use one suspect photograph that resembles the description of the perpetrator provided by the witness, five filler photographs that match the description but do not cause the suspect photograph to unduly stand out, and ten folders [four of the folders will not contain any photos and will serve as ‘dummy folders’].
2. Affix one filler photo to Folder #1 and number the folder.
3. The individual administering the lineup should place the suspect photograph and the other four filler photographs into Folders #2-6 and shuffle the photographs so that he is unaware of which folder the suspect is in, and then number the remaining folders, including Folders #7-10, which will remain empty. [This is done so that the witness does not know when he has seen the last photo].
4. The administrator should provide instructions to the witness. The witness should be informed that the perpetrator may or may not be contained in the photos he is about to see and that the administrator does not know which folder contains the suspect.
5. Without looking at the photo in the folder, the administrator is to hand each folder to the witness individually. Each time the witness has viewed a folder, the witness should indicate whether or not this is the person the witness saw and the degree of confidence in this identification, and return the photo to the administrator. The order of the photos should be preserved, in a facedown position, in order to document in Step 6.
6. The administrator should then document and record the results of the procedure. This should include: the date, time and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photos shown; copies of the photographs themselves; the order in which the folders were presented; the sources of all of the photos that were used; a statement of confidence in the witness’s own words as to the certainty of his identification, taken immediately upon reaction to viewing; and any additional information the administrator deems pertinent to the procedure.

#### **I. Show-up**

A show-up procedure is an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the perpetrator.

### **IV. Procedures: General responsibilities**

- A. Department personnel shall strictly adhere to established procedures for conducting suspect lineups in order to avoid the possibility of error or of undue suggestiveness to witnesses.
- B. Department personnel shall be trained in lineup procedures to establish uniformity and consistency of such procedures and to establish a high level of competence in carrying out this important aspect of a criminal investigation.
- C. Department personnel shall report any known errors, flaws or non-conformance with established procedures in the conduct of a suspect lineup that they may observe or become aware of to their supervisor in order that corrective actions may be taken and safeguards established to protect the innocent.
- D. The Department will confer with the Office of the Commonwealth’s Attorney in establishing lineup procedures in order to assure the best use of this type of evidence and to assure that procedures established are compatible with the prosecution of criminal cases. Likewise, instructions given to witnesses during a lineup procedure will be those established and approved in consultation with the Commonwealth’s Attorney.

### **V. Procedures**

Prior to a photo or live lineup, the investigating officer should record as complete a description as possible of the perpetrator provided by the eyewitness and in the eyewitness’s own words. This statement should also include

information regarding conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions and other impairments, including, but not limited to alcohol, drugs, stress, the presence of a weapon and any other relevant conditions. The eyewitness should also be asked if s/he needs glasses or contact lenses and whether s/he was wearing them at the time of the offense.

### **Show-up Procedure**

- A. Show-ups should only be performed using a live suspect and only in exigent circumstances that require the immediate display of a suspect to an eyewitness.
- B. Show-ups should only be conducted within two hours of the offense.
- C. Investigators should not conduct a show-up with a single photograph; if investigators want to determine if an eyewitness can make an identification using a photo, a photo lineup should be employed.
- D. Prior to employing a show-up, law enforcement should record as complete a description as possible of the perpetrator provided by the eyewitness and in the eyewitness's own words. This statement should also include information regarding conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions and other impairments, including, but not limited to alcohol, drugs, stress, the presence of a weapon and any other relevant conditions. The eyewitness should also be asked if s/he needs glasses or contact lenses and whether s/he was wearing them at the time of the offense.
- E. The eyewitness should be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a show-up.
- F. The eyewitness should be provided with the following instructions:
  - 1. The perpetrator may or may not be the person that is presented to the eyewitness;
  - 2. The eyewitness should not feel compelled to make an identification;
  - 3. The investigation will continue regardless of whether an identification is made;
  - 4. The procedure requires the investigator to ask the eyewitness to state, in his or her own words, how certain s/he is of the identification s/he has made; and
  - 5. The eyewitness should not discuss the identification procedure with other eyewitnesses involved in the case and should not speak to the media.
- G. If there are multiple eyewitnesses, only one eyewitness at a time should participate in the show-up procedure, independent of the others. If a positive identification is made, and an arrest is justified, additional eyewitnesses should be shown live or photo lineups.
- H. If identification is made, the investigator should seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified is the perpetrator.
- I. Investigators should photograph a suspect at the time and place of the show-up to preserve a record of his or her appearance at the time of the show-up.

[Agencies are encouraged to video record the show-up procedure. This assists agencies in demonstrating that they conducted the show-up at a neutral location and without any additional suggestion.]

### **Lineup Procedures (both photo and live)**

- A. The investigator in charge should select an individual to serve as the blind administrator. The blind administrator must not know which member of the lineup is the "true" suspect to conduct any lineups in order to avoid inadvertent signs or body language that may lead or cause a witness to make an incorrect identification. The blind administrator

should be thoroughly familiar with this procedure. [Alternatively a ‘blinded’ administrator may be used, namely an individual who knows the suspect’s identity but is not in a position to see which members of the line-up are being viewed by the eyewitness. This can be accomplished, for instance, through the use of the folder shuffle method or via laptop technology.]

[Blind administration is preferable to the folder shuffle method, but it is also a perfectly acceptable alternative when blind administration is not feasible, i.e. there was not an officer available to act as an administrator. It is important to document why blind administration was not feasible.]

- B. Assure that law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.
- C. A photo or live lineup should be composed so the fillers generally resemble the eyewitness’s description of the perpetrator, while ensuring that the lineup is comprised in such a manner that the suspect does not unduly stand out from the fillers. However, complete uniformity of features is not required. Avoid reusing filler photos/ live lineup members. If the eyewitness has previously viewed a photo or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup should be different from the fillers used in prior lineups.
- D. When there are multiple suspects, each identification procedure should include only one suspect.
- E. Avoid mixing color and black and white photos. Photos should be either all black and white or all color.
- F. Cover any portions of mugshots or other photographs that provide identifying information. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness. If it is necessary to block-out or cover a notation, such as a name on one photo, then similar blocking-out or covering marks should be placed on all photos so that they will appear alike.
- G. Use photos of the same size and basic composition, and never mix mugshots with other snapshots or include more than one photo of the same suspect.
- H. Select fillers (non suspects) who generally fit the witnesses’ description of the offender. When there is a limited or inadequate description of the offender provided by the witness, or when the description of the offender differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
- I. Select a photo that resembles the suspect’s description or appearance at the time of the incident, if multiple photos of the suspect are reasonably available to the investigator.
- J. Ensure that the photos are reasonably contemporary.
- K. Include a minimum of five fillers (non-suspects) per photo identification procedure and a minimum of four fillers per live lineup.
- L. Create a consistent appearance between the suspect and fillers so that the photos depict individuals who are reasonably similar in age, height, weight and general appearance, and are of the same sex and race. However, avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
- M. Create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature—such as a scar or tattoo—used to describe the perpetrator by concealing or artificially concealing that feature. If the suspect, for instance, has a facial scar or tattoo, black out, conceal or otherwise cover up that area of the suspect’s face and then do the same for each of the lineup members to achieve consistency across all lineup members.
- N. If there are multiple eyewitnesses, each eyewitness should view the lineup independently and separately and the suspect should be placed in a different position in the photo or live lineup for each eyewitness.
- O. Review the array, once completed, to ensure that the suspect does not unduly stand out.

- P. Assign each photo/person a lineup identification number. Record the identification number on the back of each photo. Refer to that photo/person only by that number. The nature of the identification number should be purposely complex to the witness, so that any inadvertent glance should not significantly hinder the identification process or alert the witness as to the identity of the actual suspect.  
[Note: Some departments use the assigned case number and simply add a series of numbers and or letters at the beginning, end or in the middle of the case number. For example, with a case number such as 2005 – 12345, one could create ID numbers like A 2005 – 12345, or 2005 – 12345 B, or 2005 – C – 12345.]
- Q. After each photo/person has been assigned an identification number, record the number along with all other pertinent information on the Lineup Identification Form.
- R. Record the presentation order of each lineup and ensure that a complete written record of the identification proceeding is made and retained. The record should include: all identification and non-identification results obtained during the procedure and signed by the eyewitness, including the eyewitness's confidence statement; the names of all of the persons present at the identification procedure, the date and time of the identification procedure, and the sources of all photos or persons used in the identification procedure. In addition, the photos themselves should be preserved in their original condition. For live lineups, a group photo should be taken of all persons in the lineup together to illustrate size differences among the lineup participants. This photo must not be shown to the witness, but will be included with the completed case file.
- S. There is a right to have counsel present at a live line-up, where the defendant-suspect has been charged.
- T. Advise the accused that he may take any position in the live lineup that he prefers and may change positions prior to summoning a new witness.
- U. Ensure that witnesses are not permitted to see nor are they shown any photographs of the accused immediately prior to the live lineup.
- V. Ensure that not more than one witness views each live lineup at a time and that they are not permitted to speak with one another during live lineup proceedings.

## **VI. Procedures: Conducting the Identification Procedure**

- A. The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or non-identification decisions.
- B. Assure that all law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.
- C. When presenting the lineup, the person administering the lineup should use the approved standard instructions for witnesses prior to the lineup that the offender might or might not be among those in the photo array or live lineup, and therefore, the witness should not feel compelled to make identification.
- D. Assure the witness prior to the lineup that regardless of whether identification is made, the police will continue to investigate the incident.
- E. Instruct the witness that if the offender is seen in the lineup, he/she might not appear exactly the same as on the date of the incident because features such as clothing, head or facial hair can change. Additionally, photos do not always depict the true complexion of a person, which might be lighter or darker than shown in the photo. Be careful not to imply or lead the witness to believe that the suspect's appearance has actually changed in any way.  
[Note: For example, saying to a witness that "The suspect's appearance could be different, for example if he has since

gotten a tattoo”, may imply to the witness that the police know the suspect got a tattoo. If uncertain about identity, this could lead the witness to pick out someone in the line-up with a tattoo simply for that reason.]

F. Provide the following additional viewing instructions to the witness:

1. Individual photos/persons will be viewed one at a time.
2. Photos/persons are in random order.
3. Take as much time as needed in making a decision about each photo/person.
4. All photos will be shown, even if identification is made prior to viewing all photos.
5. The administrator does not know who the perpetrator is.

G. Confirm that the witness understands the nature of the sequential procedure.

H. Instruct the witness that the procedure—only if identification is made—requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification at the time that the identification is made.

I. Present each photo to the witness separately, in a previously determined order, as documented on the lineup worksheet, removing those previously shown.

J. Care should be taken to avoid the witness turning over the photo and reading the identification number recorded on the back.

K. Avoid saying anything to the witness that may influence the witness’ selection.

L. If identification is made, avoid reporting or confirming to the witness any information regarding the individual he or she has selected, until the entire process (including obtaining a confidence statement and obtaining required signatures and paperwork) has been completed.

M. If the witness requests to view the photo/person sequence again, (or specific photos/persons again), they may be shown a second time, but must be shown again in the same sequence in its entirety even if the witness makes an identification during this second showing.

N. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

[Agencies are encouraged to video record the identification procedure]

## **VII. Procedures: Recording Identification Results**

A. When conducting an identification procedure, the person administering the lineup shall preserve the outcome of the procedure by documenting any identification or non-identification results obtained from the witness. A complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings.

B. When documenting the identification procedure, the person administering the lineup should record both identification and non-identification results, including a statement of confidence, in the eyewitness’s own words. [The results should not be ranked]

C. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness’s own words, as to the eyewitness’s confidence level that the person identified in a given identification procedure.

D. If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person before the administrator obtains the eyewitness’s confidence statement about the selection.



After the eyewitness' confidence statement is obtained, the administrator shall not tell the eyewitness information about how accurate they were in their identification or provide additional information about the defendant.

- E. Document in writing the photo lineup procedures, including identification information and sources of all photos used, names of all persons present at the lineup, and date and time of the identification procedure.
- F. Ensure that the results are signed and dated by the witness and the person administering the lineup.
- G. Ensure that no materials indicating previous identification results are visible to the witness.
- H. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.  
[Agencies are encouraged to video record the identification/confidence statement procedure. Audio recording is an acceptable alternative if video recording is not practical.]

## GENERAL ORDER 2-39 (ADOPTED 2005)

### Note Concerning General Order 2-39, Suspect Lineup Procedure

The Department is indebted to the Virginia State Crime Commission for their valuable and dedicated work in researching and drafting the following Sample Directive. Additionally, DCJS would like to acknowledge the contribution of research and policy development done by the Virginia Beach Police Department, as well as their willingness to share details of their written policy, Number 10.08, entitled Eyewitness Identification Procedures, effective on 11/15/02.

Reproduced here is House Document No. 40 from Publication Year 2005, which provides additional historical perspective and insight on this Sample Directive. This document is available on the official website of the Virginia General Assembly (<http://leg2.state.va.us/dls/h&sdocs.nsf/Published+by+Year?OpenForm&StartKey=2005&ExpandView>).

#### House Document No. 40 PUBLICATION YEAR 2005

**Document Title:** Report on Mistaken Eyewitness Identification

**Author:** Virginia State Crime Commission

**Enabling Authority:** HJR 79 (2004)

#### Executive Summary

During the 2004 Session of the Virginia General Assembly, Delegate Harry R. Purkey introduced House Joint Resolution 79 (HJR 79) House Joint Resolution 79 (2004). See Attachment 1., directing the Virginia State Crime Commission to study mistaken identification in criminal cases. Specifically, the resolution directs the commission to: (i) review the cases in the United States in which DNA profiling was used to exonerate persons convicted of a crime; (ii) examine the procedures used in traditional police lineups or photographic review; and, (iii) consider the sequential method as a procedure for identifying suspects. As a result of the study effort, the staff made recommendations to improve the procedures for conducting lineups in the Commonwealth of Virginia. These recommendations, as follows, were approved by the Virginia State Crime Commission:

#### Recommendations:

Recommendation 1: Amend the *Code of Virginia* to require local police and sheriff's departments to have a written policy for conducting in-person and photographic lineups.

Recommendation 2: Request the Department of Criminal Justice Services (DCJS), in cooperation with the Virginia State Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups.

Recommendation 3: Request DCJS, through regulation, to amend the entry level and in-service training academy requirements regarding lineups to include only use of the sequential method, by October 1, 2005.

Recommendation 4: Request DCJS to work with the Virginia Law Enforcement Professional Standards Commission to include the sequential method for conducting lineups as part of the accreditation process for law enforcement agencies.

Recommendation 5: Require DCJS, in conjunction with the Crime Commission, work with the Virginia Sheriffs' Association and the Virginia Chiefs of Police Association to assist members in using and understanding the benefits of the sequential method of lineups; presentation to each association's annual meetings will occur.

Recommendation 6: Amend the *Code of Virginia* to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange, as a repository for all mug shots and queries for photographic lineups.

| POLICE/SHERIFF'S OFFICE                  | GENERAL ORDERS                                    |
|--|---|
| <b>SUBJECT:</b> Suspect Lineup Procedure | <b>NUMBER:</b> 2-39                               |
| <b>EFFECTIVE DATE:</b> July 1, 2005      | <b>REVIEW DATE:</b> (annually)                    |
| <b>AMENDS/SUPERSEDES:</b> New            | <b>APPROVED:</b> _____<br>Chief of Police/Sheriff |
| <b>VLEPSC STANDARDS:</b> OPR.02.03       |   |

**NOTE:** This order is for internal use only and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third-party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a non-judicial setting.

### Index Words

*Eyewitness Evidence: A Guide for Law Enforcement*

eyewitness identification

fillers (non suspects)

lineup

lineup identification Form

lineup identification number

mugshots

photo lineup

right to counsel

sequential lineup

## I. Policy

The Department attaches the highest priority to the protection of the citizens that we serve. Recognizing that innocent persons may occasionally get caught up in the criminal investigative process and be wrongly implicated in criminal matters, we attach equal importance to clearing innocent persons as that attached to arresting the guilty.

According to a 1999 National Institute of Justice report, over 75,000 people a year become criminal defendants based on eyewitness identification.<sup>6</sup> Research of cases in which DNA evidence has been used to exonerate individuals previously convicted of crimes, leads many experts to conclude that improved, more reliable methods of handling eyewitness identifications may promote higher standards of justice. For example, of the 151 DNA exoneration cases studied, nationally<sup>7</sup>, in 61 of the first 70, mistaken eyewitness identification was a factor leading to the conviction; and, in 45 of the first 82 DNA exoneration cases, a photographic lineup was the type of pre-trial identification procedure used.<sup>8</sup>

Recognizing that the traditional system for conducting eyewitness identification procedures is not infallible and that the procedures did not incorporate the growing body of psychological study of eyewitness memory and behavior, the United States Department of Justice (DOJ) developed guidelines for conducting these procedures. The purpose of the guidelines is to prevent eyewitness error rather than correcting errors after they have occurred. The guidelines take the basic elements of police investigations and suggest workable changes in order to achieve more consistent eyewitness results.

<sup>6</sup> "Mistaken Eyewitness Identification: The Problem." Available at <http://www.innocenceproject.org/causes/mistakenid.php>.

<sup>7</sup> Id.

The following procedures incorporate the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence: A Guide for Law Enforcement*. An identification obtained through a lineup composed in this manner should minimize the risk of misidentification and have stronger evidentiary value than one obtained without these procedures. Specifically, use of these procedures should maximize the reliability of identifications, minimize unjust accusations of innocent persons and establish evidence that is reliable and conforms with established legal procedure.

## **II. Purpose**

To establish a policy for the preparation and presentation of photographic and in-person lineups.

## **III. Definitions**

### **A. Lineup**

A lineup is any procedure in which a witness to a crime or other incident is asked to identify one or more suspects from among a group of persons in order to determine or confirm the identity of the suspect(s). Such procedures involve either actually viewing of persons or viewing of photographs.

### **B. Photo Lineup**

A photo lineup is any lineup procedure in which photographs are used instead of live persons. These procedures are often used when a suspect has not been identified or when such person has not been located or arrested.

### **C. Sequential Lineup**

A sequential lineup is a particular method of conducting a suspect lineup in which persons or photographs are presented to the witness one at a time, rather than in any sort of grouping.

## **IV. Procedures: General responsibilities**

- A. Department personnel shall strictly adhere to established procedures for conducting suspect lineups in order to avoid the possibility of error or of undue suggestiveness to witnesses.
- B. Department personnel shall be trained in lineup procedures to establish uniformity and consistency of such procedures and to establish a high level of competence in carrying out this important aspect of a criminal investigation.
- C. Department personnel shall report any known errors, flaws or non-conformance with established procedures in the conduct of a suspect lineup that they may observe or become aware of to their supervisor in order that corrective actions may be taken and safeguards established to protect the innocent.
- D. The Department will confer with the Office of the Commonwealth's Attorney in establishing lineup procedures in order to assure the best use of this type of evidence and to assure that procedures established are compatible with the prosecution of criminal cases. Likewise, instructions given to witnesses during a lineup procedure will be those established and approved in consultation with the Commonwealth's Attorney.

## **V. Procedures: Composing the Lineup**

- A. The investigator in charge should select an individual who does not know which member of the lineup is the "true" suspect to conduct any lineups in order to avoid inadvertent signs or body language that may lead or cause a witness to make an incorrect identification. The officer/investigator selected should be thoroughly familiar with this procedure.
- B. Assure that law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.

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<sup>8</sup>Id.

- C. Ensure that the lineup is comprised in such a manner that the suspect does not unduly stand out. However, complete uniformity of features is not required.
- D. Avoid mixing color and black and white photos. Photos should be either all black and white or all color.
- E. Cover any portions of mugshots or other photographs that provide identifying information. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness. If it is necessary to block-out or cover a notation, such as a name on one photo, then similar blocking-out or covering marks should be placed on all photos so that they will appear alike.
- F. Use photos of the same size and basic composition, and never mix mugshots with other snapshots or include more than one photo of the same suspect.
- G. Include only one suspect in each identification procedure.
- H. Select fillers (non suspects) who generally fit the witnesses' description of the offender. When there is a limited or inadequate description of the offender provided by the witness, or when the description of the offender differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
- I. Select a photo that resembles the suspect's description or appearance at the time of the incident, if multiple photos of the suspect are reasonably available to the investigator.
- J. Ensure that the photos are reasonably contemporary.
- K. Include a minimum of five fillers (non-suspects) per identification procedure.
- L. Create a consistent appearance between the suspect and fillers so that the photos depict individuals who are reasonably similar in age, height, weight and general appearance, and are of the same sex and race. However, avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
- M. Create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature—such as a scar or tattoo—used to describe the perpetrator by artificially adding or concealing that feature.
- N. Place the suspect in different positions in each lineup when conducting more than one lineup for a case with multiple witnesses or suspects.
- O. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.
- P. Review the array, once completed, to ensure that the suspect does not unduly stand out.
- Q. Assign each photo/person a lineup identification number. Record the identification number on the back of each photo. Refer to that photo/person only by that number. The nature of the identification number should be purposely complex to the witness, so that any inadvertent glance should not significantly hinder the identification process or alert the witness as to the identity of the actual suspect.  
[Note: Some departments use the assigned case number and simply add a series of numbers and or letters at the beginning, end or in the middle of the case number. For example, with a case number such as 2005 – 12345, one could create ID numbers like A 2005 – 12345, or 2005 – 12345 B, or 2005 – C – 12345.]
- R. After each photo/person has been assigned an identification number, record the number along with all other pertinent information on the Lineup Identification Form.
- S. Record the presentation order of each lineup and ensure that a complete written record of the proceeding is made and retained. In addition, the photos themselves should be preserved in their original condition. For live lineups, a group photo should be taken of all persons in the lineup together to illustrate size differences among the lineup participants. This photo must not be shown to the witness, but will be included with the completed case file.



- T. Remember that a defendant who has been charged with a crime has a constitutional right to counsel for all proceedings that involve the defendant personally which follow that status.
- U. Photo lineups need not consider right to counsel issues as they do not involve the defendant personally.
- V. Advise the accused that he may take any position in the live lineup that he prefers and may change positions prior to summoning a new witness.
- W. Ensure that witnesses are not permitted to see nor are they shown any photographs of the accused immediately prior to the lineup.
- X. Ensure that not more than one witness views each lineup at a time and that they are not permitted to speak with one another during line up proceedings.

## **VI. Procedures: Conducting the Identification Procedure**

- A. The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or non-identification decisions.
- B. Assure that all law enforcement and/or prosecutorial personnel present and involved in the case are knowledgeable about the procedure so that they will not interfere or influence any witness during the process. Unnecessary personnel should be removed from the location where the process is being conducted.
- C. When presenting the lineup, the person administering the lineup should use the approved standard instructions for witnesses prior to the lineup that the offender might or might not be among those in the photo array or live lineup, and therefore, the witness should not feel compelled to make an identification.
- D. Assure the witness prior to the lineup that regardless of whether an identification is made, the police will continue to investigate the incident.
- E. Instruct the witness that if the offender is seen in the lineup, he/she might not appear exactly the same as on the date of the incident because features such as clothing, head or facial hair can change. Additionally, photos do not always depict the true complexion of a person, which might be lighter or darker than shown in the photo. Be careful not to imply or lead the witness to believe that the suspect's appearance has actually changed in any way.  
  
[Note: For example, saying to a witness that "The suspect's appearance could be different, for example if he has since gotten a tattoo", may imply to the witness that the police know the suspect got a tattoo. If uncertain about identity, this could lead the witness to pick out someone in the line-up with a tattoo simply for that reason.]
- F. Provide the following additional viewing instructions to the witness:
  - a. Individual photos/persons will be viewed one at a time.
  - b. Photos/persons are in random order.
  - c. Take as much time as needed in making a decision about each photo/person.
  - d. All photos will be shown, even if an identification is made prior to viewing all photos.
- G. Confirm that the witness understands the nature of the sequential procedure.
- H. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.
- I. Present each photo to the witness separately, in a previously determined order, as documented on the lineup worksheet, removing those previously shown.

- J. Care should be taken to avoid the witness turning over the photo and reading the identification number recorded on the back.
- K. Avoid saying anything to the witness that may influence the witness' selection.
- L. If an identification is made, avoid reporting or confirming to the witness any information regarding the individual he or she has selected, until the entire process (including all required signatures and paperwork) has been completed.
- M. If the witness requests to view the photo/person sequence again, (or specific photos/persons again), they may be shown a second time, but must be shown again in the same sequence in its entirety even if the witness makes an identification during this second showing.
- N. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

## **VII. Procedures: Recording Identification Results**

- A. When conducting an identification procedure, the person administering the lineup shall preserve the outcome of the procedure by documenting any identification or non-identification results obtained from the witness. A complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings.
- B. When documenting the identification procedure, the person administering the lineup should record both identification and non-identification results, including the witness' own words.
- C. Document in writing the photo lineup procedures, including identification information and sources of all photos used, names of all persons present at the lineup, and date and time of the identification procedure.
- D. Ensure that the results are signed and dated by the witness and the person administering the lineup.
- E. Ensure that no materials indicating previous identification results are visible to the witness.
- F. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

## GENERAL ORDER 2-1 (ADOPTED 1993)

| POLICE/SHERIFF'S OFFICE                        | GENERAL ORDERS   |
|--|--|
| <b>SUBJECT:</b> Constitutional Safeguards      | <b>NUMBER:</b> 2-1   |
| <b>EFFECTIVE DATE:</b>                         | <b>REVIEW DATE:</b>  |
| <b>AMENDS/SUPERSEDES:</b> GO 2-1, October 1993 | <b>APPROVED:</b> _____<br>Chief of Police/Sheriff                        |
| <b>CALEA STANDARDS:</b>                        | <b>VLEPSC STANDARDS:</b> ADM.02.01-.03, OPR.02.-03, OPR.04.03, OPR.12.03 |

**NOTE:** This order is for internal use only, and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third-party claims. Violations of this directive, if proven, can only form the basis of a complaint by this department, and then only in a non-judicial administrative setting.

### Index Words

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| Authority; limitations    | Plain view search               |
| Confessions               | Probable cause                  |
| Consent to search         | Reasonable suspicion            |
| Constitutional safeguards | Search and seizure;             |
| Curtilage                 | limitations                     |
| Discretion                | of vehicles (custodial arrests) |
| Emergency searches        | of vehicles (generally)         |
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### I. Policy

Of all the actions an officer might take during the course of duty, the ones with the most severe consequences concern constitutional rights. The use of deadly force might result not only in injury or death but a review of the constitutionality of the act. Similarly, the arrest of a person for a misdemeanor shoplifting, by contrast, invokes the law of arrest and search and seizure issues that are controlled by the Constitution. The U.S. Constitution and the Bill of Rights guarantee every citizen certain safeguards from government intrusion into their lives. These safeguards have become the cornerstone for the application of criminal justice in America. Consequently, these safeguards have placed limitations on the authority of police to enforce the laws of the nation, state, and the town/county of [ ]. The department expects officers to observe constitutional safeguards scrupulously and knowledgeably. The department further expects that officers understand the limits and prerogatives of their authority to act. Respect for the civil liberties of citizens shall be the paramount concern in all enforcement matters.

## II. Purpose

The purpose of this general order is to define the legally mandated authority for the enforcement of laws, to establish procedures for ensuring compliance with constitutional requirements during criminal investigations, to set forth guidelines concerning the use of discretion by officers, and to define the authority, guidelines and circumstances when officers should exercise alternatives to arrests and pretrial confinement.

## III. Probably cause and reasonable suspicion

### A. Probable cause

Searches (with the few important exceptions outlined in this order) and all arrests are based on the police officer's perception of probable cause. According to the U.S. Supreme Court, "Probable cause exists where the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

1. An officer must have probable cause to undertake a search or make an arrest.
2. When an officer has appropriate probable cause, he or she may undertake a complete body search (not including a body-cavity search), record the suspect's fingerprints, take the suspect's photograph, and jail him. The aim of probable cause is to make a formal charge.

### B. Reasonable suspicion

Reasonable suspicion involves a standard less than probable cause, generally defined by the courts as a circumstance or collection of circumstances that would lead a trained, experienced officer to believe that criminal activity may be afoot.

1. An officer must have reasonable suspicion to temporarily detain a citizen.
2. When an officer has reasonable suspicion, he or she may undertake a pat-down of a suspect's outer clothing for weapons and record the circumstances of the encounter. The aim of reasonable suspicion is to resolve an ambiguous situation.

### C. Elements of probable cause

1. Probable cause may be established through investigation and observation, witnesses, confidential informants, or through anonymous sources provided that the information is corroborated by investigation.
2. Unnamed informants may be used in an affidavit for a search warrant if the informant has first-hand knowledge of the investigation and information is included about why the informant is credible and reliable. See GO 2-11 for further information on informants.

## V. Procedures: General

### A. Law-enforcement authority

1. *Code of Virginia § 15.2-1701* authorizes any locality to organize a police force and § 15.2-1704 invests the police force of the locality with authority to prevent and detect crime, apprehend criminals, safeguard life and property, preserve the peace, and enforce state and local laws and ordinances.
2. § 49-1 requires that all officers, before performing their duties, take an oath whereby they swear to support the Constitution of the United States and the Constitution of the Commonwealth of Virginia.

### B. Limitations on law enforcement authority

Limitations on law enforcement authority are derived from statutes, federal, state, and local judicial interpretation of laws, opinions of the attorney general and commonwealth's attorney, departmental policies/rules and regulations, and town administrative decisions.

## 1. Statutory limitations

These limitations include, but are not limited to:

- a. Enforcement of laws outside of the town limits. § 19.2-250 grants authority to enforce state criminal laws one mile beyond the boundaries of the town except as specified.
- b. § 15.2-1725 grants the town authority to enforce laws and local ordinances on town-owned property located outside of its boundaries. Examples: airports, public hospital, public water supply or watershed, public park, public school, sewage treatment.
- c. § 15.2-1724 allows town officers to be sent anywhere in Virginia to assist another locality in meeting an emergency involving any immediate threat to life or public safety, as outlined in the statute. Further, § 15.2-1727-8 allows localities to enter into reciprocal agreements with localities outside Virginia to provide mutual aid. Notwithstanding the provisions of these two statutes, § 15.2-1730 allows the chief of police, in a declared emergency, to call upon other chief law-enforcement officers of towns or counties to provide law-enforcement assistance without a need to deputize officers from other jurisdictions.

## 2. Judicial limitations

Courts constantly interpret laws that place limitations on the authority of law-enforcement officers. The more common limitations address Miranda rights/warnings, rulings on search and seizure, eyewitness identification, and lineups. The department shall provide policy guidance concerning these decisions, as appropriate.

[Note: The law of interviews, interrogations, and searches and seizures continuously evolves. Consult your legal advisor or commonwealth's attorney for guidance before adopting this model order.]

# V. Interviews and interrogations

## A. Definitions

1. An interview, as opposed to an interrogation, may be construed as any conversation with a suspect, witness, victim, or the citizen.
2. An interrogation, to paraphrase the Supreme Court, includes direct questioning (or its functional equivalent) about a crime or suspected crime, as well as any words or conduct on behalf of the police that may elicit an incriminating response from the suspect.
  - a. Officers are reminded that an interrogation does not rely solely or exclusively on words; conduct can be the "functional equivalent" of asking questions.
3. A person is in custody when an officer tells him or her that he or she is under arrest. The functional equivalent of being in custody occurs when a reasonable person in the suspect's place would feel that his or her freedom of action has been restricted to the same degree as a formal arrest.

## B. Rights admonition

1. In order to achieve uniformity in administering Miranda warnings, police officers shall be issued cards with the Miranda warnings and waiver on them. Before custodial interrogation, officers shall advise suspects of their rights by reading aloud from the card the following:
  - a. "You have the right to remain silent."
  - b. "Anything you say can and will be used against you in a court of law."
  - c. "You have the right to talk to a lawyer and have him present with you while you are being questioned."
  - d. "If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one."
  - e. "You may stop talking at any time."



2. After the warning, in order to secure a waiver, the officer shall ask and receive affirmative replies to the following questions:
  - a. “Do you understand each of these rights I have explained to you?”
  - b. “Having these rights in mind, do you wish to talk to us now?”
3. After the rights have been read, understood, and the person wishes to waive them, the officer will have the suspect sign the waiver of rights form. Officers shall interrogate suspects only when they have knowingly and intelligently waived their rights. Officers shall cease questioning whenever the suspect invokes the right to silence or requests the presence of counsel.
  - a. Officers shall not try to elicit incriminating evidence unless the suspect waives the right to counsel.
  - b. If a suspect, once in custody, requests counsel after being advised of Miranda rights, he or she cannot be interrogated again about the crime for which he or she was charged, other crimes, or by any other officers unless (1) the counsel is present during the interrogation or (2) the suspect himself initiates the interrogation. Officers therefore cannot obtain a waiver under these circumstances unless the suspect initiates interrogation. If a suspect refers to counsel but his or her intentions are unclear, officers may question the suspect further to clarify his or her intentions.
  - c. If the suspect is deaf or unable to speak English, the interrogating officer shall notify the on-duty supervisor and shall immediately arrange to obtain an interpreter. [Insert here your local arrangements for obtaining sign-language or other language interpreters. If the suspect does not speak English, no interrogation should be attempted without a competent translator.]
4. Officers will take care when advising juveniles of their rights to ensure that the rights are understood before obtaining a waiver. Officers should honor a child’s request to speak to a parent or guardian before waiving his or her rights. Whenever possible, the child’s parents should be present while the child’s rights are explained and the waiver obtained.
5. If a suspect has invoked his or her right to silence, officers may interrogate the suspect if, after a passage of time, the suspect initiates communication with officers. Before questioning, however, officers shall again administer Miranda warnings and shall obtain a written waiver.

#### C. Voluntariness of confessions

The courts have provided officers with much latitude in interrogating suspects. If a suspect claims that he or she was coerced into confessing, the courts will examine the interrogation according to the totality of the circumstances. If interrogation methods appear to overcome the suspect’s will, then the courts will find any resulting confession to be involuntary. If officers use trickery, threats, or offer promises to obtain confessions, they must:

1. Carefully assess the suspect’s background, age, education, mental impairment, and physical condition to determine vulnerability to coercion; and
2. Coupled with the background characteristics, choose an appropriate mix of interrogation tactics and environmental factors to convince the suspect to confess without overbearing the suspect’s will. Note that Miranda warnings would have been given before the interrogation takes place, in most instances.

#### D. Exemptions or special cases

1. Miranda warnings do not apply to the following situations which are non-custodial.  
This list is not all-inclusive:
  - a. Brief on-scene questioning.
  - b. Identification procedures such as fingerprinting, conducting a lineup, sobriety tests. (Questioning during booking may require Miranda warnings.)

- c. Volunteered, spontaneous statements. (Once the officer has heard the suspect express spontaneous incriminating statements, the officer shall then advise the suspect of Miranda rights and obtain a waiver before asking additional questions.)
- d. Brief investigative detention or stop/frisk.
- e. Roadside questioning during routine traffic stops, including DUI stops until custodial interrogation begins.
- f. Routine booking questions attendant to arrest.
- g. Questioning by private persons.

2. Public-safety exception

When an officer urgently needs information from a suspect because lives are in imminent danger, officers may delay giving Miranda warnings until the officers have received information sufficient to dispel the emergency. Officers are advised that a genuine, life-threatening emergency must exist.

E. Documentation requirements

- 1. Officers shall document the circumstances surrounding the conduct of interrogations and the recording of confessions. Required information includes but is not limited to the following:
  - a. Location, date, time, duration of the interrogation.
  - b. Identities of all persons present.
  - c. Miranda warnings given, the suspect's responses, and any waivers provided.
  - d. The nature and duration of any breaks or lapses during the interrogation and the reasons for them.
- 2. Video or audio tape recordings shall be treated as evidence and handled accordingly. Before the tapes are stored as evidence, a duplicate shall be made and likewise treated as evidence, the fact of it being a duplicate should be clearly noted on all paperwork.

## VI. Search and seizure: Warrantless searches

A. Definition

A search occurs where (1) there is a "prying into hidden places by the police officer" and (2) the person whose premises or person is being searched has a reasonable expectation of privacy.

- B. The Fourth Amendment guarantees the right for people to be free from unreasonable searches and seizures of their homes, persons and things. The Supreme Court is continuously interpreting the Fourth Amendment as it applies to police conduct. Illegally seized items of evidence will not be admitted in court and may be cause for a lost criminal case. Additionally, an illegally conducted search invites civil suits and criminal prosecution. In order to ensure that Fourth Amendment rights are protected, officers will obtain search warrants upon probable cause in all appropriate criminal cases except for the following circumstances. *Search warrants are discussed under GO 2-2.*

- 1. Consent searches
- 2. Emergency searches
- 3. Plain view and "plain feel"
- 4. Abandoned property and open fields
- 5. Inventory searches of vehicles
  - 6. When executing arrest warrants
  - 7. Incident to arrest (see GO 2-4)
  - 8. Pat-downs of suspicious persons (see GO 2-3)

As a general rule, no arrest warrant or search warrant is required for an arrest in a public place, as long as probable cause exists.

### C. Consent

1. A search warrant is not necessary where a person who has authority or control over the thing or place searched consents to the search. Note that the officer doesn't have to have reasonable suspicion nor probable cause to make a consent search: he or she may merely ask for permission from someone with control over the premises. If that person grants permission, the search may take place. The sole justification for a consent search is the existence of knowing, intelligent, and voluntary consent.

Consent searches must observe the following rules:

- a. Generally, the person granting consent must use, access, or control the property. A person having exclusive possession of some part of jointly-owned property can only give consent for a search of that part.
  - b. If two people have joint ownership of property, either may give consent. If possible, have the consenting party sign a written permission-to-search form.
  - c. A landlord, including a hotel or motel manager, cannot consent to a search of a tenant's premises, unless the tenant has been evicted or has abandoned the property.
  - d. A husband or wife, or one member of a cohabiting unmarried couple, may consent to a search of areas in common ownership or use.
  - e. A parent may consent to a search of premises occupied by a dependent child if the parent also has access to the premises.
  - f. An employee cannot give valid consent to a search of his employer's premises unless he has been left in custody of the premises.
  - g. An employer may generally consent to a search of premises used by employees, except premises used solely by an employee (e.g., a locker).
2. Consent must be given voluntarily. If an officer requests consent from a citizen under circumstances which a reasonable person would consider coercive, then officers must seek a warrant. The officer may have the burden of demonstrating voluntariness.
  3. A person who initially gives consent may withdraw it at any time. Officers shall then secure the premises and seek a warrant if probable cause exists.
  4. Refusal to give consent, in itself, cannot justify further law-enforcement action.
  5. The scope of a consent search is limited to the area for which consent has been given, and within this area officers may search only into areas where the objects sought could reasonably be hidden.

### D. Emergency searches

1. A search warrant is not necessary in an emergency. An emergency is sometimes termed "exigent circumstances."
2. Eleven considerations determine whether an emergency exists:
  - a. The degree of urgency involved and the time required to get a warrant.
  - b. Officer's reasonable belief that contraband is about to be removed or destroyed. [Note that not all crimes are serious enough to create exigent circumstances. See "e" below.]
  - c. The possibility of danger to others including officers left to guard the site.
  - d. Information that the possessors of contraband are aware that police are on their trail.
  - e. Whether the offense is serious, or involves violence.

- f. Whether officers reasonably believe the suspects are armed.
  - g. Whether the officers have probable cause at the time of entry.
  - h. Whether the officers have strong reason to believe the suspects are present on the premises.
  - i. The likelihood that the suspects will escape.
  - j. The suspects' entry onto premises after hot pursuit. To justify warrantless entry following hot pursuit, the arrest process must have begun away from the premises, and the offender knows that he or she is under arrest, and the offender tries to avoid arrest.
  - k. A reasonable belief that someone on the premises is in distress and in need of emergency assistance.
3. If officers enter premises with probable cause to believe that critical evidence may be destroyed or removed unless immediate action is taken, they may enter without a warrant, secure premises, and obtain a search warrant before proceeding further unless they have obtained consent to search, or some new circumstances arise necessitating another warrantless search.

#### E. Plain view

1. A plain-view seizure is, technically, not a search. To make a plain-view seizure of property (contraband, fruits, or instrumentalities of the crime), two requirements must be met:
- a. From a lawful vantage point, the officer must observe contraband left in open view; and
  - b. It must be immediately apparent to the officer that the items he or she observes may be evidence of a crime, contraband, or otherwise subject to seizure.
2. During a lawful frisk (stemming from a lawful stop), if an officer detects an object that is or might reasonably be an item that is contraband or other criminal evidence, then the object may be seized. Threatening items such as weapons may always be removed during frisks. Non-threatening items may be removed only if their contraband or evidentiary nature is immediately apparent (the so-called "plain-feel" rule).

#### F. Abandoned property and open fields

1. A search warrant is not required for property that has been abandoned.
2. To constitute abandoned property, two conditions must apply:
- a. Property was voluntarily abandoned.
  - b. Property was discarded outside the area in which someone has a reasonable expectation of privacy.
3. Open fields are not protected by the Fourth Amendment, but officers must distinguish them from curtilage, searches of which require a warrant. Curtilage is the area of a dwelling which is necessary, convenient, and habitually used by the family for domestic purposes. The extent of curtilage of a private residence is determined by whether the area is enclosed; the nature and use of the area; the proximity of the area to the home; and any measures taken by the owner to protect the area from observation. Note that under some circumstances surveillance (e.g., aerial surveillance) of activities within curtilage may take place without a warrant.

#### G. Inventories of vehicles

1. The department requires officers to inventory any lawfully impounded vehicle, or a vehicle removed from the street and placed in police custody. Any evidence or contraband found during the inventory may be used to formulate probable cause for a subsequent search or arrest. Vehicles shall be inventoried per departmental procedure which requires an inventory of the entire contents, including closed containers (provided they can be opened without breakage). The purpose of an inventory is to ensure safekeeping of private property and to protect the department from liability. To repeat, in order to justify an inventory of a vehicle, the following conditions must be met:

- a. Officers must have lawful custody of it.
  - b. The inventory shall be conducted pursuant to departmental policy.
  - c. The scope of the inventory shall be limited to those parts of a vehicle likely to conceal important, hazardous, or valuable items including, but not limited to, the passenger compartment, the trunk, and glove compartment.
2. Closed containers may be examined if they are likely to contain valuable property. If closed containers are locked or sealed, they shall not be forced open but simply logged on the inventory form. [Agencies should obtain legal advice before creating a policy that allows locked areas of an automobile to be forcibly opened during an inventory.]
  3. The vehicle and its closed containers shall not be damaged.

#### H. When executing arrest warrants

1. General guidance

An officer with an arrest warrant may search for the defendant in his or her own home provided that the warrant was valid; the officer searches the defendant's home (and not someone else's); and probable cause exists that the defendant is home at the time of the search. The search for the defendant must be limited to places where he or she might be found.

2. Protective sweep

Following the execution of an arrest warrant, officers may undertake a "protective sweep" of the premises where the arrest takes place without a warrant. Certain limitations must be observed, however:

- a. The purpose of the protective sweep is to discover persons on the premises who might present a danger to officers.
- b. Incident to arrest, officers may, without probable cause or reasonable suspicion, look into closets or other spaces immediately adjoining the place of arrest where threatening persons might be located.
- c. In order to extend the protective sweep beyond closets and adjoining spaces, officers must have reasonable suspicion for fearing that persons may be on the premises who pose a threat. In such cases, the sweep is limited to examining places where a person might hide.
  - (1) Officers shall carefully document their reasonable suspicion.
- d. During a protective sweep, evidence discovered in plain view may be seized.
- e. The sweep must cease when officers have dispelled a reasonable suspicion of danger.
 

(Note: With a search warrant, a protective sweep is always justified.)

### VII. Eyewitnesses

A. Eyewitness identifications generally do not provide reliable evidence during criminal investigations. Consequently, the Supreme Court has addressed this issue in numerous cases and set forth guidelines to be followed when eyewitness identifications are solicited by officers. Eyewitness identifications may take the following form.

1. On-scene identification

One-on-one identifications have been held constitutional so long as the period of time between the offense and the identification is brief. One to three hours would be a reasonable amount of time.

2. Lineups

Lineups should be conducted using a minimum of six persons having similar physical characteristics as the suspect. The accused has the right to have an attorney present during the lineup and the lineup may not take place until the attorney is present. The attorney may not offer any suggestions concerning the conduct of the lineup,

but may merely observe. Officers shall document the date, time, place, name of participants and witnesses, and the location of suspect/participants in the lineup.

### 3. Photo lineups

In conducting photo lineups, the photos shall depict persons displaying similar physical characteristics as the suspect. Simply showing an eyewitness a single photo of the suspect has been ruled unconstitutional. As a general rule, a photo lineup containing 6-8 photos is reasonable. Photographs shown to witnesses shall not contain any identifying information. Photo lineups will be documented as under (2) above.

## B. Hearsay

1. Officers shall understand the rules by which hearsay can be considered evidence and therefore of use in an investigation.
  - a. According to the Virginia Supreme Court, hearsay is “evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he has heard others say.”
2. Hearsay is generally inadmissible in court.
3. Some hearsay is useful as evidence. Some exceptions to the Hearsay Rule, and therefore admissible include:
  - a. A dying declaration or a statement, oral or written, made by a mortally wounded person who knows that he is about to die and has abandoned hope of recovery.
  - b. Spontaneous declarations, or exclamations of a participant or bystander concerning an incident, made without time for reflection.
  - c. Public records, or reports prepared by public officials under a duty imposed by law or regulation.  
[Check with your commonwealth’s attorney regarding the admissible hearsay of a young child who appears to be reporting abuse.]

## VIII. Vehicles

In recent years, the U.S. Supreme Court has modified and expanded the conditions under which officers may search vehicles. Preferably, officers shall search vehicles under the authority of a warrant whenever sufficient time exists to obtain one. Nevertheless, warrantless searches of vehicles may take place under many conditions and circumstances. It is imperative that officers understand the different types of vehicle searches and their limitations.

### A. Definitions

1. For the purposes of this section, a motor vehicle is any vehicle operating or capable of being operated on public streets or highways, from trucks to automobiles to mobile homes. A vehicle that has been immobilized in one location for use as a storage facility or home is not a motor vehicle for Fourth Amendment purposes.
2. For the purposes of this section, a search is an examination of a motor vehicle with an investigative motive, that is, to discover evidence or to examine the vehicle identification number (VIN) to ascertain ownership.

### B. When warrantless vehicle searches may be performed

As noted earlier, warrants shall be obtained to search vehicles, if feasible, unless an emergency exists. Any vehicle that has been disabled with little chance of its being driven away shall be searched with a warrant. In all other cases, vehicles may be searched without a warrant under the following circumstances:

1. When probable cause exists.
2. With the driver’s consent.
3. Incident to the arrest of the occupants.



4. To frisk for weapons.
5. When necessary to examine the VIN or to otherwise ascertain ownership.
6. Under emergencies or exigent circumstances.
7. Inventories.

C. Searches may be conducted within the following limitations:

1. With a warrant, a search may extend anywhere within the vehicle, unless limited by the warrant itself.
2. When probable cause exists, a search may extend anywhere within the vehicle, unless the probable cause is limited to a specific part of the vehicle.
3. When consent has been obtained from the driver, officers may search the vehicle subject to any limitations specified by the consenting person. Consent shall be obtained in writing, if feasible.
4. Searches incident to the arrest of an occupant shall be limited to any area within reach of the arrestee. The area within reach is deemed to be the passenger compartment. The trunk, engine compartment, and any locked compartments shall not be searched unless immediately accessible to the suspect. (See GO 2-4 for a fuller treatment of searches incident to arrests.)
5. Frisks for weapons shall be confined to the passenger area. Any place not immediately accessible to the occupants, such as a locked glove compartment, shall not be frisked. If the contents of a container are immediately accessible to the subject, a closed container may be searched for weapons.
  - a. Note that an officer can order the suspect from the vehicle and frisk both the suspect and the vehicle.
6. An entry into the vehicle to examine the VIN or otherwise determine ownership must be limited to these purposes.
7. An emergency search of the vehicle may be conducted but the extent of the search must not exceed whatever is necessary to respond to the emergency.
 

Note: If the initial search under the above conditions gives rise to probable cause that evidence, contraband, fruits, or instrumentalities of the crime might be found elsewhere in the vehicle, officers may search those areas that might reasonably contain such items.

D. Containers within the vehicle

As a rule, no container within a vehicle shall be searched unless it might contain the item(s) sought.

1. Procedures for unlocked containers
  - a. In a probable cause search, containers may be opened wherever found in the vehicle.
  - b. When the passenger area is searched incident to an arrest, containers within the passenger area may be opened.
  - c. During a consent search, containers may be opened provided that the terms of the consent either so permit or reasonably imply permission.
  - d. Containers found in or discarded from a vehicle under circumstances not amounting to probable cause or in connection with a search incident to an arrest shall not be searched but shall be secured until a warrant is obtained.
2. Procedures for locked containers
 

Under most conditions, locked containers shall be opened under a warrant unless one of the following circumstances has been met:

  - a. Consent has been given.

- b. Probable cause exists to search the vehicle and the object of the search might be found in the container.  
(Even in this circumstance, a warrant is preferred.)
- c. Inventory.

**E. Conduct of the vehicle search**

- 1. When possible, searches of vehicles shall be conducted contemporaneous with the stopping or discovery of the vehicle. As a general rule, vehicle searches shall be conducted as soon as reasonably possible.
- 2. When possible, officers shall avoid damaging a vehicle or its contents, and shall minimize the intrusiveness of the search and any inconvenience suffered by the passengers or owner.
- 3. As vehicles may contain sharp or pointed objects, and perhaps even syringes or other materials with body fluids on them, officers shall take precautions to minimize exposure to communicable diseases. See GO 2-34.

**IX. Limitations on authority**

**A. Limitations on law-enforcement authority by local courts**

Occasionally, the local courts may limit law-enforcement authority to enforce state statutes and local ordinances. The department manual shall contain relevant orders offering appropriate guidance to officers. These limitations include, but are not limited to:

- 1. The enforcement of certain parking ordinances.
- 2. The handling of juvenile offenders.
- 3. The issuance of summonses as opposed to arrests/incarceration.
- 4. Restrictions relating to the animal control ordinance.

**B. Limitations on law enforcement authority by the commonwealth's attorney**

Occasionally, the commonwealth's attorney may issue opinions to the department imposing limitations on officers. These areas include, but are not limited to:

- 1. Prosecution of certain cases.
- 2. Extradition.
- 3. Enforcement of certain statutes pending opinions from the attorney general's office.

**C. Limitations on law-enforcement authority by the town manager or chief of police**

Limitations on police enforcement actions by town council, town manager, or the chief of police include, but are not limited to:

- 1. City/town tag violations.
- 2. Parking violations.

**D. Changes in laws/interpretational limitations**

Periodically, changes take place which may impose new limitations on police authority or remove or alter existing limitations. Normally, annual updates on such changes are provided to all personnel by the commonwealth's attorney. In case immediate changes in departmental operations are required, the commonwealth's attorney's office may provide information orally and confirm it in writing.

## X. Constitutional Requirements: General

### A. Compliance with constitutional requirements during criminal investigations

1. All officers when conducting criminal investigations shall take all precautions necessary to ensure that all persons involved are afforded their constitutional protections. Officers shall ensure that:
  - a. All statements or confessions are voluntary and non-coercive.
  - b. All persons are advised of their rights in accordance with this general order.
  - c. All arrested persons are taken promptly before a magistrate for formal charging.
  - d. All persons accused or suspected of a criminal violation for which they are being interrogated are afforded an opportunity to consult with an attorney.
  - e. Prejudicial pre-trial publicity of the accused is avoided so as not to interfere with a defendant's right to a fair and impartial trial. See RR 1-13, Media Relations.

### B. The use of discretion by officers

1. Officers, by the nature of their job, are required to exercise discretion in the performance of their duties. The department provides officers with written policies, rules, departmental orders, directed patrol assignments, and training in order to aid them in making decisions which govern discretion in performing their duties.
2. With the exception of rules and regulations, general orders give officers procedures to follow for common or critical enforcement tasks. By definition, general orders afford officers a window of discretion within which to act. General orders are to be followed unless unusual or extreme circumstances dictate another course of action. In this case, officers shall make reasoned decisions in their discretion based on good judgment, experience, and training. It is up to the individual officer to consider the relevant facts, the situation, and then, using knowledge, training, and good judgment, make appropriate decisions. Supervisors must closely observe the use of discretion by their subordinates and point out factual errors or alternatives that may be more appropriate.

### C. Alternatives to arrest/prearrest confinement

1. Under certain circumstances, officers are faced with situations where an arrest and prearrest confinement will not be possible. In such cases, officers may elect to exercise certain alternatives such as the issuance of summonses, referral to a social service agency, or simply to give a warning. Examples:
  - a. Mentally or emotionally disturbed persons.
  - b. Domestic situations where counseling may be appropriate except where probable cause requires an arrest, as detailed in GO 2-32.
  - c. Juvenile offenders. See General Order 2-29, Juvenile Procedures.
  - d. Transient persons who need shelter and food.
  - e. Certain misdemeanor cases.
2. Authority to issue summonses in lieu of arrest/confinement
  - a. § 19.2-74 authorizes officers to issue a summons in lieu of arrest for persons charged with a misdemeanor criminal offense except D.U.I. and drunk in public. Additionally, § 19.2-74 authorizes the use of summonses when enforcing city ordinances.
  - b. In determining whether a summons should be used, the officer shall:
    - (1) Decide whether the offense committed is serious.
    - (2) Make a judgment as to whether the accused poses a danger to the public or himself.
    - (3) Decide, based on circumstances, whether the person may disregard a summons.

3. Informal handling of criminal matters

Officers often deal with situations where the public interest would be better served by social service agencies or crisis and professional organizations. When in the judgment of the officer a better solution to the problem will be achieved by use of alternatives to enforcement, he or she should refer the citizen to an appropriate social services agency.

4. Use of warnings as an alternative to arrest

The use of warnings may sometimes provide a solution to a problem and may enhance the public perception of the department. Normally, the use of a warning occurs in traffic offenses, but occasionally may be applied to criminal offenses. In determining if a warning should be issued, the officer shall consider:

- a. The seriousness of the offense.
- b. The likelihood that the violator will heed the warning.
- c. The reputation of the violator, i.e., known repeat offender, has received previous warnings, etc.

5. Limitations on intelligence activity

- a. Departmental intelligence gathering activities shall be limited to that information concerning criminal conduct that presents a threat to the community.
- b. Departmental personnel and equipment shall only be used in conjunction with intelligence gathering activities, as defined above, in full compliance with all law, and only with the advance approval of the chief of police/sheriff.
- c. Intelligence information shall be collected, used, and processed in full compliance with all laws.
- d. Informants, see GO 2-11.



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